

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34319

STATE OF IDAHO,)	2008 Unpublished Opinion No. 606
)	
Plaintiff-Respondent,)	Filed: August 15, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
L. DAN FAIRBANKS,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Order denying motion for credit for time served, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

L. Dan Fairbanks appeals from the district court's order denying his motion for credit for time served. For the reasons stated below, we affirm.

I.

FACTS AND PROCEDURE

In 2002, based on a guilty plea, Fairbanks was sentenced to a unified term of four years, with a minimum period of confinement of two years, for conspiracy to deliver methamphetamine. He was released on parole in April 2003. Fairbanks twice failed urine tests for methamphetamine in March and May of 2004. At the time of the second failed test, Fairbanks was caught attempting to use a urinary apparatus, commonly referred to as a "whizzinator," with urine that was not his own. A subsequent search of his home revealed evidence of methamphetamine production and usage. Fairbanks was arrested on May 4, 2004,

for violating his parole, which was later revoked, and was returned to the custody of the Department of Corrections.

On July 7, 2004, while he was in custody on his parole violation, the state filed a complaint against Fairbanks stemming from the events of his second failed urine test and the subsequent search of his home. The complaint included charges for trafficking in methamphetamine, manufacture of a controlled substance where a child is present, possession of a controlled substance, and alteration and/or concealment of evidence. In February 2005, the complaint was amended to include several counts of possession of a controlled substance in Fairbanks's body as well as in a pipe and glass jar found in his garage. Fairbanks pled guilty to alteration and/or concealment of evidence, I.C. § 18-2603; and possession of a controlled substance, I.C. § 37-2732(c)(1), and the remaining charges were dismissed. A judgment of conviction was entered on July 6, 2005, and Fairbanks was sentenced to a unified term of five years, with a minimum period of confinement of three years for alteration and/or concealment of evidence and a concurrent, unified term of seven years, with a minimum period of confinement of three years, for possession of a controlled substance. The district court also ordered that the sentences run concurrent with Fairbanks's 2002 sentence for which he was in custody at the time. Fairbanks requested credit of 427 days for time served from his initial arrest on May 4, 2004, for the parole violation through his sentencing on July 6, 2005. The district court refused Fairbanks's request for credit, reasoning that Fairbanks was in the custody of the Department of Corrections for the parole violation and on the underlying criminal offense, not on the current offenses upon which no arrest warrant had ever issued.

In 2007, Fairbanks filed a motion for credit for time served for the 427 days. The district court again denied the motion on the same reasoning. Furthermore, the district court held that credit is appropriate only when incarceration is a result of the offense or included offense for which judgment was entered, not merely a result of the conduct which gave rise to the offense. Fairbanks appeals.

II.

ANALYSIS

Whether the district court properly applied the law governing credit for time served is a question of law over which we exercise free review. *State v. Covert*, 143 Idaho 169, 170, 139 P.3d 771, 772 (Ct. App. 2006); *State v. Brashier*, 130 Idaho 112, 113, 937 P.2d 424, 425 (Ct.

App. 1997). An individual is to receive credit in the judgment of conviction for any period of incarceration served prior to the entry of judgment, “if such incarceration was for the offense . . . for which the judgment was entered.” I.C. § 18-309. This Court has previously clarified:

An entitlement to credit under I.C. § 18-309 depends upon the answer to a simple inquiry: was the defendant’s incarceration upon the offense for which he was sentenced? If a particular period of confinement served prior to the imposition of sentence is not attributable to the charge or conduct for which a sentence is to be imposed, the offender is not entitled to credit for such confinement.

State v. Hale, 116 Idaho 763, 765, 779 P.2d 438, 440 (Ct. App. 1989).

A defendant is not entitled to credit for time served in a case where the incarceration is not attributable to the underlying charge. *Brashier*, 130 Idaho at 114, 937 P.2d at 426. In *Brashier*, the defendant asserted that he would have been granted parole but for the investigation and charge of infamous crime against nature. This Court, however, held:

Brashier’s incarceration was not attributable to the charge of infamous crime against nature until he was initially sentenced for that crime. The sentence he was already serving for burglary and the sentence for the crime in this case then began to run concurrently. Even assuming that the investigation and charges in this case led to the denial of Brashier’s parole, his term of incarceration at that time was still due to the burglary conviction. Just as parole or probation may be revoked due to criminal activity unrelated to the underlying offense, so to, it may be denied without altering the crime to which the sentence is attributable.

Id. Accordingly, this Court affirmed the district court’s determination of Brashier’s credit for time served.

Fairbanks argues that his arrest for violating parole and his subsequent judgment of conviction for the instant drug-related offenses arose out of the same conduct. Therefore, he alleges that he should be credited for time served from the time of his arrest on the parole violation on May 4, 2004, through his sentencing on the additional charges.

We recently held that, when simultaneous incarceration occurs as a result of a probation violation and a new criminal charge that is based upon precisely the same conduct, the defendant is entitled to credit when concurrent sentences are imposed. *See State v. McCarthy*, 145 Idaho 397, 399, 179 P.3d 360, 362 (Ct. App. 2008). In that case, McCarthy was placed on probation for possession of methamphetamine. When he subsequently attempted to deliver methamphetamine to an undercover officer, a bench warrant was issued on his probation

violation. An arrest warrant for delivery of methamphetamine was also issued against McCarthy. Therefore, he was in custody on both warrants. The charges were disposed of at a consolidated sentencing proceeding where he received concurrent sentences. We determined under those facts that, because the same act gave rise to the warrants issued for arrest on the new charge and for the probation violation and the incarceration was served simultaneously, the incarceration could not be uniquely attributable to either case individually. *Id.* Therefore, granting credit on each sentence from the date the warrants were issued did not result in the defendant receiving more credit than time actually served. *Id.*

In this case, however, there were not separate arrest warrants issued against Fairbanks for the parole violation and for the subsequent drug-related charges. When he attempted to alter the results of his May 2004 drug test and later failed it, he was arrested for violating parole and returned to the custody of the Department of Corrections. Thereafter, when a criminal complaint was filed against him, he was transported to the district court to appear on the new charges. Because he was released on the new charges, Fairbanks would have been free to leave on his own recognizance were it not for the revocation of his parole. Had the parole board reinstated Fairbanks's parole, there existed no hold for him on the current offenses. *McCarthy* is inapplicable under these circumstances. Therefore, we apply the holding of *Brashier* and conclude that Fairbanks's incarceration was attributable only to his underlying 2002 sentence until Fairbanks was sentenced on the new charges. The district court did not err when it denied Fairbanks's motion for credit for time served.

III.

CONCLUSION

Fairbanks's incarceration was uniquely attributable to his parole violation and he was not in custody on the new offenses until he was sentenced. Therefore, the district court's order denying Fairbanks's motion for credit for time served is affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**